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**FROM: Paula Durr**

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Listed below are the item(s) being submitted with this Certificate of Transmission:\*\*

- 1) Fee Transmittal-1 page
- 2) Appeal Brief-17 pages
- 3)
- 4)
- 5)

Number of Pages Including this Page: 19

Inventor(s): Deckner  
S.N.: 10/009,083  
Filed: March 20, 2002  
Case: AA399XM

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U.S. Patent and Trademark Office: U.S. DEPARTMENT OF COMMERCE

PTO/SB/17 (12-04)

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<b>FEE TRANSMITTAL</b> <b>for FY 2005</b> Patent fees are subject to annual revision. Effective December 8, 2004	<b>Complete if Known</b>	
	Application Number	10/009,083
	Confirmation Number	5574
	Filing Date	March 20, 2002
	First Named Inventor	George Endel Deckner
	Examiner Name	Qazi, Sabiha Naim
	Art Unit	1616
<b>TOTAL AMOUNT OF PAYMENT (\$500)</b>		Attorney Docket No. AA399XM

<b>METHOD OF PAYMENT</b>				<b>FEE CALCULATION (continued)</b>																																																
1. <input checked="" type="checkbox"/> The Director is hereby authorized to charge indicated fees submitted on this form, credit any over payments, and charge any additional fee(s) during the pendency of this application to: Deposit Account Number: 16-2480 Deposit Account Name: The Procter & Gamble Company				<b>5. ADDITIONAL FEES</b> <table border="1"> <thead> <tr> <th>Fee Description</th> <th>Fee</th> <th>Fee Paid</th> </tr> </thead> <tbody> <tr> <td>Extension for reply within 1<sup>st</sup> month</td> <td>(\$120)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Extension for reply within 2<sup>nd</sup> month</td> <td>(\$450)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Extension for reply within 3<sup>rd</sup> month</td> <td>(\$1,020)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Extension for reply within 4<sup>th</sup> month</td> <td>(\$1,590)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Extension for reply within 5<sup>th</sup> month</td> <td>(\$2,160)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Information Disclosure Statement fee</td> <td>(\$180)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>37 CFR 1.16(f) Late Oath/Declaration (nonprovisional)</td> <td>(\$130)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>37 CFR 1.17 (g) Surcharge - Late provisional filing fee or cover sheet</td> <td>(\$50)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Non-English specification</td> <td>(\$130)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Notice of Appeal</td> <td>(\$500)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Filing a brief in support of an appeal</td> <td>(\$500)</td> <td>[500]</td> </tr> <tr> <td>Request for oral hearing</td> <td>(\$1,000)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Acceptance of unintentionally delayed claim for priority under 35 U.S.C. 119, 120, 121, or 365 (a) or (c)</td> <td>(\$1,370)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Other:</td> <td></td> <td><input type="checkbox"/></td> </tr> </tbody> </table>				Fee Description	Fee	Fee Paid	Extension for reply within 1 <sup>st</sup> month	(\$120)	<input type="checkbox"/>	Extension for reply within 2 <sup>nd</sup> month	(\$450)	<input type="checkbox"/>	Extension for reply within 3 <sup>rd</sup> month	(\$1,020)	<input type="checkbox"/>	Extension for reply within 4 <sup>th</sup> month	(\$1,590)	<input type="checkbox"/>	Extension for reply within 5 <sup>th</sup> month	(\$2,160)	<input type="checkbox"/>	Information Disclosure Statement fee	(\$180)	<input type="checkbox"/>	37 CFR 1.16(f) Late Oath/Declaration (nonprovisional)	(\$130)	<input type="checkbox"/>	37 CFR 1.17 (g) Surcharge - Late provisional filing fee or cover sheet	(\$50)	<input type="checkbox"/>	Non-English specification	(\$130)	<input type="checkbox"/>	Notice of Appeal	(\$500)	<input type="checkbox"/>	Filing a brief in support of an appeal	(\$500)	[500]	Request for oral hearing	(\$1,000)	<input type="checkbox"/>	Acceptance of unintentionally delayed claim for priority under 35 U.S.C. 119, 120, 121, or 365 (a) or (c)	(\$1,370)	<input type="checkbox"/>	Other:		<input type="checkbox"/>
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<b>2. BASIC FILING FEE - Large Entity</b> <table border="1"> <thead> <tr> <th>Application Type</th> <th>FILING FEE</th> <th>SEARCH FEE</th> <th>EXAMINATION FEE</th> <th>Fee Paid</th> </tr> </thead> <tbody> <tr> <td>Utility</td> <td>(\$300)</td> <td>(\$500)</td> <td>(\$200)</td> <td>(Total = \$1000) <input type="checkbox"/></td> </tr> <tr> <td>Design</td> <td>(\$200)</td> <td>(\$100)</td> <td>(\$130)</td> <td>(Total = \$430) <input type="checkbox"/></td> </tr> <tr> <td>Reissue</td> <td>(\$300)</td> <td>(\$500)</td> <td>(\$600)</td> <td>(Total = \$1400) <input type="checkbox"/></td> </tr> <tr> <td>Provisional filing fee</td> <td></td> <td></td> <td></td> <td>(Total = \$200) <input type="checkbox"/></td> </tr> </tbody> </table>				Application Type	FILING FEE	SEARCH FEE	EXAMINATION FEE	Fee Paid	Utility	(\$300)	(\$500)	(\$200)	(Total = \$1000) <input type="checkbox"/>	Design	(\$200)	(\$100)	(\$130)	(Total = \$430) <input type="checkbox"/>	Reissue	(\$300)	(\$500)	(\$600)	(Total = \$1400) <input type="checkbox"/>	Provisional filing fee				(Total = \$200) <input type="checkbox"/>	<b>3. APPLICATION SIZE FEE:</b> Sheets of Spec and Drawings <input type="checkbox"/> (\$250 for each 50 sheets in excess of 100, except for sequence and program listings) SUBTOTAL (2)+(3) (\$0)																							
Application Type	FILING FEE	SEARCH FEE	EXAMINATION FEE	Fee Paid																																																
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<b>SUBMITTED BY</b>		<b>Registration No.</b>		<b>Complete (if applicable)</b>	
Name (Print/Type)	Roddy M. Bullock	(Attorney/Agent)	37,290	Telephone	(513) 634-0870
Signature				Date	June 13, 2005

This collection of information is required by 37 CFR 1.14. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon individual case. Any comments on the amount of time you are required to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P. O. Box 1450, Alexandria, VA 22313-1450. DO NOT

JUN 13 2005

Appl. No. 10/009,083  
Atty. Docket No. AA399XM  
Appeal Brief dated June 13, 2005  
Reply to Office Action of February 23, 2005  
Customer No. 27752

<b>Certification of Mailing or Facsimile Transmission</b>	
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Name: Paula Durr	Registration No. (if applicable)
Signature: <i>Paula Durr</i>	Signature
Date: June 13, 2005	Date

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/009,083  
Applicant(s) : George Endel Deckner  
Filed : March 20, 2002  
Title : Absorbent Article with Skin Care Composition  
TC/A.U. : 1616  
Examiner : Qazi, Sabiha Naim  
Conf. No. : 5574  
Docket No. : AA399XM  
Customer No. : 27752

APPEAL BRIEF

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P. O. Box 1450  
Alexandria, VA 22313-1450  
Dear Sir,

This is responsive to the Final Office Action mailed on 2/23/2005 in the above-captioned application. A Response to Final Office Action was mailed April 12, 2005, to which no Advisory Action was received. A Notice of Appeal was filed on April 12, 2005, for filing an Appellants' Brief.

REAL PARTY IN INTEREST

This Application has been assigned to The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

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### **STATUS OF CLAIMS**

The present application was originally filed under 35 USC 371 with claims 1-36. Claims 1- 36 are finally rejected.

Appellants appeal the final rejection of Claims 1-36. The Notice of Appeal for these claims was transmitted by facsimile on April 12, 2005 and received by the Office on April 12, 2005. A complete copy of the appealed claims is set forth in the Claims Appendix.

### **STATUS OF AMENDMENTS**

Appellants' reply mailed on April 12, 2005 contained no amendments to the Claims.

### **SUMMARY OF CLAIMED SUBJECT MATTER**

The invention provides an absorbent article, such as a sanitary napkin, having a body contacting surface, and an absorbent core. At least a portion of the body contacting surface comprises an effective amount of a skin care composition which is solid or semisolid at 40°C and which is transferable to the wearer's skin by contact, movement, etc. The skin care composition has certain other properties believed to be novel, including viscosity under shear, as claimed in Claims 1, 30, and their respective dependent claims. In one embodiment the skin care composition comprises a skin care active ingredient.

### **GROUND S OF REJECTION TO BE REVIEWED ON APPEAL**

1. Rejection of Claims 1-36 under 35 USC §102(e) over US 6,570,054 issued to Gatto et al. (hereinafter, "Gatto").
2. Rejection of Claims 1-36 under 35 USC §103(a) over the three-way combination of WO 98/55158 issued to Osborn et al. (hereinafter "Osborn"), WO 99/12530 issued to Van Rijswijck et al. (hereinafter "Van Rijswijck"), and WO 99/22648 issued to Roe et al. (hereinafter "Roe").

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## ARGUMENTS

**ISSUE 1: Whether US 6,570,054 issued to Gatto et al. (hereinafter, "Gatto") anticipates the claimed invention (Claims 1-36) under 35 USC 102(e).**

### DESCRIPTION OF GATTO ET AL.

Gatto discloses a lotion composition for use on absorbent articles. In this respect Gatto is very similar to the present invention. Gatto discloses various shear properties of the composition and, in relevant part, the lotion composition being in a melt state at 40°C. At column 35, lines 42 to 48, Gatto discloses the lotion at 40°C as being melted "prior to being applied to the article" (emphasis added).

### STANDARD FOR FINDING ANTICIPATION UNDER 35 USC 102

Federal Circuit decisions have repeatedly emphasized that anticipation is established only if (1) all the elements of an invention, as stated in a patent claim,<sup>1</sup> (2) are identically set forth,<sup>2</sup> (3) in a single prior art reference.<sup>3</sup> As shown below, aside from being a single prior art reference, Gatto fails to meet the requirements of this standard.

<sup>1</sup> Verve, LLC v. Crane Cams, Inc., 311 F.3d 1116, 1120, 65 USPQ2d 1051 (Fed. Cir. 2002) ("A single reference must describe the claimed invention with sufficient precision and detail to establish that the subject matter existed in the prior art. See, e.g., In re Spada, 911 F.2d 705, 708, 15 USPQ2d 1655, 1657 (Fed. Cir. 1990) ('the reference must describe the applicant's claimed invention sufficiently to have placed a person of ordinary skill in the field of the invention in possession of it').")

<sup>2</sup> Gechter v. Davidson, 116 F.3d 1454, 1457, 43 USPQ2d 1030, 1032 (Fed. Cir. 1997) ("Under 35 U.S.C. § 102, every limitation of a claim must identically appear in a single prior art reference for it to anticipate the claim."); Glaverbel Societe Anonyme v. Northlake Marketing & Supply, Inc., 45 F.3d 1550, 1554, 33 USPQ2d 1496, 1498 (Fed. Cir. 1995) ("Anticipation requires identity of the claimed process and a process of the prior art; the claimed process, including each step thereof, must have been described or embodied, either expressly or inherently, in a single reference."); "Anticipation ... requires identity of invention: the claimed invention, as described in appropriately construed claims, must be the same as that of the reference, in order to anticipate."; Tyler Refrigeration v. Kysor Industrial Corp., 777 F.2d 687, 689, 227 USPQ 845, 846-47 (Fed. Cir. 1985) ("Identity of invention is a question of fact

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**ARGUMENTS WITH RESPECT TO INDEPENDENT CLAIMS 1 and 30**

**I. Gatto fails to disclose with sufficient precision an having “a portion [which] comprises ... a skin care composition which is solid or semisolid at 40°C ...”**

With respect to the first requirement the Federal Circuit has stated that the claim elements must be described with sufficient precision and detail to establish that the subject matter existed in the prior art. As shown below, Gatto does not disclose the portion of the claimed invention underlined above with *any* precision, much less “sufficient precision” so as to place the subject matter in the prior art.

Gatto discloses the lotion composition being in a melt state at 40 degrees C. At column 35, lines 42 to 48, Gatto discloses the lotion at 40 degrees C as being melted “prior to being applied to the article.” Therefore, Gatto does not disclose with sufficient precision and detail the lotion being solid or semi-solid at 40 degrees C. In fact, Gatto teaches the opposite with sufficient precision.

To be clear, the Examiner has yet to state with specificity where she finds in Gatto any disclosure of sufficient precision for “a portion [which] comprises ... a skin care composition which is solid or semisolid at 40°C ...”

Accordingly, because Gatto fails to disclose, teach, or even suggest a skin care composition which is solid or semisolid at 40°C ...” with *any* precision, much less *sufficient* precision, as required by CAFC case law, the Appellants submit that Gatto fails to anticipate Claims 1 and 30.

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and the challenger must ordinarily show that each element of the claim in issue is found in a prior patent or publication, either expressly or under principles of inherency”).

<sup>3</sup> Mehl/Biophile International Corp. v. Milgraum, 192 F.3d 1362, 1365, 52 USPQ2d 1303, 1306 (Fed. Cir. 1999) (“To anticipate, a single reference must teach every limitation of the claimed invention.”); Oney v. Ratliff, 182 F.3d 893, 51 USPQ2d 1697 (Fed. Cir. 1999); Finnigan Corp. v. U.S. Int’l Trade Comm’n, 180 F.3d 1354, 1367, 51 USPQ2d 1001, 1009 (Fed. Cir. 1999) (“A prior art reference anticipates a patent claim if the reference discloses, either expressly or inherently, all of the limitations of the claim.”); General Electric Co. v. Nintendo Co., Ltd., 179 F.3d 1350, 1356, 50 USPQ2d 1910, 1915 (Fed. Cir. 1999) (“A judgment of invalidity for anticipation requires that a single prior art reference disclose every limitation in a patent claim.”); Rockwell International Corp. v. United States, 147 F.3d 1358, 1363, 47 USPQ2d 1027, 1031 (Fed. Cir. 1998).

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**II. Gatto fails to *identically set forth* "a portion [which] comprises ... a skin care composition which is solid or semisolid at 40°C ..."**

With respect to the second requirement of the Federal Circuit's standard for finding anticipation (stated above), all the claim elements of the invention must not only be disclosed with sufficient precision in the prior art, but they must be identically set forth.

As noted above (*i.e.*, in the description of Gatto), Gatto does not disclose an article having "a portion [which] comprises ... a skin care composition which is solid or semisolid at 40°C ..." Although it is clear that anticipation does not require *ipsissimis verbis* correspondence for each claim term, it is settled law that anticipation requires identity.<sup>4</sup> Federal Circuit decisions, explicitly or implicitly, reject any standard of "substantial identity."<sup>5</sup> For each element, the allegedly anticipating reference must have an identically-corresponding element.

The requirement for identity means that the identical invention must be shown in as complete detail as is contained in the patent claim.<sup>6</sup> Notions of concept, essence, or gist are no more useful in the context of Section 102 than elsewhere, because they divert the fact finder's attention from the subject matter of the invention as a whole.<sup>7</sup> In this case, Gatto does not show, teach or disclose "a portion [which] comprises ... a skin care composition which is solid or semisolid at 40°C ...".

Emphasizing "the rigors of anticipation," the Federal Circuit, in Motorola, Inc. v. Interdigital Technology Corp. (1997)<sup>8</sup>, held that a jury's verdict that one patent claim was anticipated by a prior art reference could not stand because the reference lacked a limitation the claim required. As clearly shown above, Gatto can also not stand as an anticipating reference because it lacks a limitation the claim requires, namely it does not

<sup>4</sup> Tyler Refrigeration v. Kysor Indus. Corp., 777 F.2d 687, 227 USPQ 845 (Fed. Cir. 1987).

<sup>5</sup> See Key Pharmaceuticals v. Hercon Laboratories Corp., 161 F.3d 709, 718-19, 48 USPQ2d 1911, 1919 (Fed. Cir. 1998).

<sup>6</sup> Richardson v. Suzuki Motor Co., 868 F.2d 1226, 9 USPQ2d 1913 (Fed. Cir. 1989). The claimed invention, as described in the appropriately construed claims, must be the same as that of the reference, in order to anticipate. Glaverbel S.A. v. Northlake Mkt'g & Supp. Inc., 45 F.3d 1550, 33 USPQ2d 1496 (Fed. Cir. 1995).

<sup>7</sup> Panduit Corp. v. Dennison Mfg. Co., 774 F.2d 1082, 227 USPQ 37 (Fed. Cir. 1985).

<sup>8</sup> Motorola, Inc. v. Interdigital Technology Corp., 121 F.3d 1461, 43 USPQ2d 1481 (Fed. Cir. 1997).

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teach an article having "a portion [which] comprises ... a skin care composition which is solid or semisolid at 40°C ..." as required by the claimed invention.

To be clear, the Examiner has yet to state with specificity where she finds in Gatto identical disclosure for "a portion [which] comprises ... a skin care composition which is solid or semisolid at 40°C ..."

Accordingly, because Gatto fails to disclose identically an absorbent article having "a portion [which] comprises ... a skin care composition which is solid or semisolid at 40°C ..." the Appellants submit that Gatto fails to anticipate Claims 1 and 30.

III. Gatto fails to *identically set forth* an absorbent article having a skin care composition, wherein the skin care composition "has a viscosity of more than about  $10^5$  Poise under shear stress of less than about  $3 \times 10^4$  dynes/cm<sup>2</sup>, and viscosity of less than about  $10^2$  Poise under shear stress of more than about  $10^6$  dynes/cm<sup>2</sup>, at 40°C."

The Examiner has yet to indicate where in Gatto she finds the following claim limitation identically set forth an absorbent article having:

"a skin care composition, wherein the skin care composition "has a viscosity of more than about  $10^5$  Poise under shear stress of less than about  $3 \times 10^4$  dynes/cm<sup>2</sup>, and viscosity of less than about  $10^2$  Poise under shear stress of more than about  $10^6$  dynes/cm<sup>2</sup>, at 40°C."

Unless, and until a rejection is made, Appellants respectfully submit that, in fact, the above-mentioned claim limitation is not identically set forth in Gatto.

Although it is clear that anticipation does not require *ipsissimis verbis* correspondence for each claim term, it is settled law that anticipation requires identity.<sup>9</sup> For each element, the allegedly anticipating reference must have an identically-corresponding element. No such identically-corresponding element has been identified in

<sup>9</sup> Tyler Refrigeration v. Kysor Indus. Corp., 777 F.2d 687, 227 USPQ 845 (Fed. Cir. 1987).



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Gatto. Not only has no such identical element been identified during prosecution of the present invention, the Appellants have been unable to derive any such identical elements from a close reading of Gatto.

To be clear, the Examiner has yet to state with specificity where she finds in Gatto any disclosure for a an absorbent article having a skin care composition, wherein the skin care composition "has a viscosity of more than about  $10^5$  Poise under shear stress of less than about  $3 \times 10^4$  dynes/cm<sup>2</sup>, and viscosity of less than about  $10^2$  Poise under shear stress of more than about  $10^6$  dynes/cm<sup>2</sup>, at 40°C."

The requirement for identity means that the identical invention must be shown in as complete detail as is contained in the patent claim.<sup>10</sup> Notions of concept, essence, or gist are no more useful in the context of Section 102 than elsewhere, because they divert the fact finder's attention from the subject matter of the invention as a whole.<sup>11</sup> In this case, Gatto does not show, teach or disclose even the concept or essence of a color having a first and second shade, the first shade being positioned substantially within the second shade. To consider the notions of Gatto in their broadest sense, therefore, does not reach identity—that is, Gatto does not show in as complete detail as is contained in the patent claim for a color having a first and second shade, the first shade being positioned substantially within the second shade.

Emphasizing "the rigors of anticipation," the Federal Circuit, in Motorola, Inc. v. Interdigital Technology Corp. (1997)<sup>12</sup>, held that a jury's verdict that one patent claim was anticipated by a prior art reference could not stand because the reference lacked a limitation the claim required. As clearly shown above, Gatto can also not stand as an anticipating reference because it does not teach the above-mentioned claim element.

Accordingly, because Gatto fails to disclose identically an absorbent article having a skin care composition, wherein the skin care composition "has a viscosity of more than about  $10^5$  Poise under shear stress of less than about  $3 \times 10^4$  dynes/cm<sup>2</sup>, and

<sup>10</sup> Richardson v. Suzuki Motor Co., 868 F.2d 1226, 9 USPQ2d 1913 (Fed. Cir. 1989). The claimed invention, as described in the appropriately construed claims, must be the same as that of the reference, in order to anticipate. Glaverbel S.A. v. Northlake Mkt'g & Supp. Inc., 45 F.3d 1550, 33 USPQ2d 1496 (Fed. Cir. 1995).

<sup>11</sup> Panduit Corp. v. Dennison Mfg. Co., 774 F.2d 1082, 227 USPQ 37 (Fed. Cir. 1985).

<sup>12</sup> Motorola, Inc. v. Interdigital Technology Corp., 121 F.3d 1461, 43 USPQ2d 1481 (Fed. Cir. 1997).

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viscosity of less than about  $10^2$  Poise under shear stress of more than about  $10^6$  dynes/cm<sup>2</sup>, at 40°C”, the Appellants submit that Gatto fails to anticipate Claims 1 and 30.

**IV. Gatto fails to enable “a skin care composition which is solid or semisolid at 40°C ...”**

To anticipate a claim, a reference must disclose every element of the challenged claim and enable one skilled in the art to make the anticipating subject matter.<sup>13</sup> Enablement requires that the prior art teach one of ordinary skill in the art to make or carry out the claimed invention without undue experimentation.<sup>14</sup>

Not only does anticipation require identity of claim elements, which, as shown above, Gatto fails to do, anticipation also requires that the anticipating disclosure enable the claimed invention, thus placing the allegedly disclosed matter in the possession of the public.

Gatto clearly fails to enable one skilled in the art to carry out the claimed invention because Gatto teaches a skin care composition that is melted at the claimed 40°C.

Accordingly, because Gatto teaches the opposite of what is claimed, and therefore fails to enable the claimed invention, it cannot be held that Gatto anticipates the claimed invention. Therefore, the Appellants submit that Gatto fails to anticipate Claims 1 and 30.

**V. Gatto fails to enable an absorbent article having an absorbent article having a skin care composition, wherein the skin care composition “has a viscosity of more than about  $10^5$  Poise under shear stress of less than about  $3 \times 10^4$  dynes/cm<sup>2</sup>, and viscosity of less than about  $10^2$  Poise under shear stress of more than about  $10^6$  dynes/cm<sup>2</sup>, at 40°C.”**

<sup>13</sup> PPG industries, inc. v. Guardian Industries Corp., 75 F.3d 1558, 1566, 37 USPQ2d 1618, 1624 (Fed. Cir. 1996). (emphasis added).

<sup>14</sup> Minnesota Mining and Manufacturing Co. v. Chemque, Inc., 303 F.3d 1924, 1301, 64 USPQ2d 1270, 1278 (Fed. Cir. 2002).

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To anticipate a claim, a reference must disclose every element of the challenged claim and enable one skilled in the art to make the anticipating subject matter.<sup>15</sup> Enablement requires that the prior art teach one of ordinary skill in the art to make or carry out the claimed invention without undue experimentation.<sup>16</sup>

Not only does anticipation require identity of claim elements, which, as shown above, Gatto fails to do, anticipation also requires that the anticipating disclosure enable the claimed invention, thus placing the allegedly disclosed matter in the possession of the public.

Even with the benefit of hindsight analysis of the present invention, there is nothing in Gatto that could be construed as enabling one of ordinary skill in the art to achieve an absorbent article having a skin care composition, wherein the skin care composition "has a viscosity of more than about  $10^5$  Poise under shear stress of less than about  $3 \times 10^4$  dynes/cm<sup>2</sup>, and viscosity of less than about  $10^2$  Poise under shear stress of more than about  $10^6$  dynes/cm<sup>2</sup>, at 40°C."

Accordingly, because Gatto does not teach or disclose the claimed viscosity and shear properties, it cannot be held that Gatto anticipates the claimed invention. Therefore, the Appellants submit that Gatto fails to anticipate Claims 1 and 30.

#### **ARGUMENTS WITH RESPECT TO DEPENDENT CLAIMS 2-29 and 31-36**

**VI. In addition to failing to anticipate independent Claims 1 and 30, Gatto fails to anticipate each of their respective dependent claims.**

Because Claims 1 and 30 are novel, dependent Claims 2-29 and 31-36 are likewise novel. Nevertheless, for completeness, the dependent claims are considered briefly below.

The arguments made above with respect to Claims 1 and 30 are incorporated by reference to the arguments for each respective dependent claim. Therefore, while

<sup>15</sup> PPG industries, inc. v. Guardian Industries Corp., 75 F.3d 1558, 1566, 37 USPQ2d 1618, 1624 (Fed. Cir. 1996). (emphasis added).

<sup>16</sup> Minnesota Mining and Manufacturing Co. v. Chemque, Inc., 303 F.3d 1924, 1301, 64 USPQ2d 1270, 1278 (Fed. Cir. 2002).

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avoiding repeating the details and analysis presented above with respect to Claims 1 and 30, the Appellants maintain that Gatto fails to disclose all the elements of the dependent claims with sufficient precision, and fails to set forth each element identically, and fails to enable one skilled in the art to make the claimed subject matter.

Furthermore, for each of the dependent claims, the Examiner gave no specific rejections. For example, at page 8 in the Office Action of March 20, 2002, the Examiner stated her rejection in full: "See the entire document, especially the abstract and claims." Likewise, at page 5 of the February 23, 2005 Office Action, the Examiner stated: "See the entire document, especially the abstract, Tables 1-5, claims, lines 5-43 in col. 9, as well as the specific citations cited below." Therefore, with no specifics identified in the Examiner's cursory rejection, the response below simply replies to the general rejection.

**To be clear, the Examiner has yet to state with specificity where she finds in Gatto any disclosure for any of the limitations of the dependent claims.**

With respect to Claim 2-29 and 31-36, the Examiner gave no indication where in Gatto she finds the claimed subject matter set forth each element identically with sufficient precision to enable one skilled in the art to make the claimed subject matter.

The claim limitations of Claims 2-29 and 31-36 are not found in the Examiner's general citations. Accordingly, because the Examiner has not identified any anticipating disclosure, the Appellants have no reply except to agree that Gatto apparently fails to anticipate Claims 2-29 and 31-36.

Accordingly, because Gatto fails to identically disclose, teach, or even suggest the elements of Claims 2-29 and 31-36, the Appellants submit that Gatto fails to anticipate Claims 2-29 and 31-36.

**ISSUE 2: Whether or not Claims 1-36 are obvious over the three-way combination of WO 98/55158 issued to Osborn et al. (hereinafter "Osborn"), WO 99/12530 issued to Van Rijswijck et al. (hereinafter "Van Rijswijck"), and WO 99/22648 issued to Roe et al. (hereinafter "Roe").**

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**VII. The three-way combination of Osborn, Van Rijswijck, and Roe do not, and have not been shown to, disclose, either singly or in combination, each of the elements of any of the instant claims.**

Claims 1- 36 have been rejected under 35 USC §103(a) as being unpatentable over the above-cited references. The Examiner has yet to make out a *prima facie* case of obviousness, so no detailed response can be made by the Appellants. *See*, MPEP §2143.

Specifically, the Examiner has not shown where in any of the above-mentioned documents she finds all the elements of Claims 1 or 30, much less any of their respective dependent claims. Again, the Examiner has not made out a *prima facie* case of obviousness. *See*, MPEP §2143.

For example, the Final Office Action states with respect to Osborn: "See the entire document ..." (Page 8; statement repeated for Van Rijswijck and Roe). However, nowhere in the Office Action does the Examiner show what specific portion of Osborn is relevant to specific Claim elements. General references to, e.g., "the third paragraph on page 21," without any indication as to what claim limitation might be referred to are insufficient to meet the standard for finding *prima facie* obviousness, which requires that each element be disclosed in a cited reference.

Further, the Examiner states without support: "The prior art teaches absorbent article [*sic*], the composition, the immobilizing agent, the melting point of the temperature [*sic*] (solid or semisolid at 40 degrees Celsius), and all other ingredients." (Final Office Action, page 9) Aside from the fact that the Appellants have not claimed such nonsense as "the melting point of the temperature," nowhere does the Examiner state where she finds, e.g., "all other ingredients." Again, such cursory treatment confirms that the Examiner has not yet made out a *prima facie* case of obviousness to which the Appellants must reply.

**VIII. The Examiner has not shown any motivation to combine the three-way combination of Osborn, Van Rijswijck, and Roe in any combination that would achieve the instant claims.**

Conclusory statements such as "It would have been obvious to one skilled in the art at the time of invention to prepare an absorbent article comprising a body contacting surface and an absorbent core by containing a skin care composition because the prior art teaches it," (Office Action of 09/09/2004, page 5) do not meet the standard for actually

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finding such obviousness. For example, the Examiner has not stated a reason why one skilled in the art might be motivated or prompted to combine the three separate references. Furthermore, even if the conclusory statement identified above were true, it is irrelevant because what the Examiner says is obvious is not what is claimed.

Therefore, the Applicant respectfully disagrees that "the burden of proof is upon applicants to show that instantly claimed subject matter is different and unobvious over those taught by prior art, as the Examiner maintains (Final Office Action, page 10). Until a *prima facie* case of obviousness is made, the burden of proof remains with the Examiner. See, MPEP §2143.

Therefore, until a *prima facie* case of obviousness is established, the Applicant submits that Claims 1 – 36 are, in fact, not rendered obvious by any or all of the cited references, and should be allowed.

#### SUMMARY

In view of all of the above, Appellants respectfully submit that all the pending Claims 1-36 are patentable over the cited art. Appellants ask the board to carefully consider the arguments above, and, if the invention is found to be novel and nonobvious, to promptly permit the claims to proceed to allowance.

Respectfully submitted,

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### CLAIMS APPENDIX

1. (Original) An absorbent article comprising a body contacting surface and an absorbent core, wherein
  - (1) at least a portion of the body contacting surface comprises an effective amount of a skin care composition which is solid or semisolid at 40°C and which is transferable from the body contacting surface to the wearer's skin by contact, normal wearer motion and body heat at a level effective in providing a skin benefit to the wearer's skin, and
  - (2) the skin care composition has viscosity of more than about  $10^5$  Poise under shear stress of less than about  $3 \times 10^4$  dynes/cm<sup>2</sup>, and viscosity of less than about  $10^2$  Poise under shear stress of more than about  $10^6$  dynes/cm<sup>2</sup>, at 40°C.
2. (Original) The absorbent article of Claim 1 wherein the skin care composition has viscosity of more than about  $10^6$  Poise under shear stress of less than about  $3 \times 10^4$  dynes/cm<sup>2</sup> at 40°C.
3. (Original) The absorbent article of Claim 2 wherein the skin care composition has viscosity of less than about  $10^1$  Poise under shear stress of more than about  $10^6$  dynes/cm<sup>2</sup> at 40°C.
4. (Original) The absorbent article of Claim 3 wherein the skin care composition has consistency of not more than about 300 at 40°C.
5. (Original) The absorbent article of Claim 4 wherein the skin care composition has consistency of not more than about 150 at 40°C.
6. (Original) The absorbent article of Claim 5 wherein the skin care composition has consistency of not more than about 100 at 40°C.
7. (Original) The absorbent article of Claim 6 wherein the skin care composition comprises from about 40 to about 90 % of an emollient and from about 10 to about 60 % of an agent immobilizing the emollient.
8. (Original) The absorbent article of Claim 7 wherein the emollient is selected from the group consisting of petroleum-based, fatty acid ester type, alkyl ethoxylate type,

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fatty acid ester ethoxylates, fatty alcohol type, polysiloxane type, and mixtures of them.

9. (Original) The absorbent article of Claim 8 wherein the emollient is petrolatum.
10. (Original) The absorbent article of Claim 9 wherein petrolatum comprises a heavy aliphatic hydrocarbons and a light aliphatic hydrocarbons, wherein petrolatum contains the heavy aliphatic hydrocarbons more than the light aliphatic hydrocarbons.
11. (Original) The absorbent article of Claim 10 wherein the heavy aliphatic hydrocarbons have alkyl chain length of from 33-36 and light aliphatic hydrocarbons have alkyl chain length of from 23-26, wherein the ratio of the heavy aliphatic hydrocarbons to the light aliphatic hydrocarbons is between 2.0 : 1.0 and 1.0 : 1.0.
12. (Original) The absorbent article of Claim 11 wherein the ratio of the heavy aliphatic hydrocarbons to the light aliphatic hydrocarbons is between 1.5 : 1.0 and 1.0 : 1.0.
13. (Original) The absorbent article of Claim 10 wherein the heavy aliphatic hydrocarbons have alkyl chain length of from 30-36 and light aliphatic hydrocarbons have alkyl chain length of from 20-26, wherein the ratio of the heavy aliphatic hydrocarbons to the light aliphatic hydrocarbons is between 2.5 : 1.0 and 1.0 : 1.0.
14. (Original) The absorbent article of Claim 13 wherein the ratio of the heavy aliphatic hydrocarbons to the light aliphatic hydrocarbons is between 2.0 : 1.0 and 1.0 : 1.0.
15. (Original) The absorbent article of Claim 10 wherein the heavy aliphatic hydrocarbons have alkyl chain length of from 27-36 and light aliphatic hydrocarbons have alkyl chain length of from 17-26, wherein the ratio of the heavy aliphatic hydrocarbons to the light aliphatic hydrocarbons is between 3.5 : 1.0 and 1.5 : 1.0.



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16. (Original) The absorbent article of Claim 15 wherein the ratio of the heavy aliphatic hydrocarbons to the light aliphatic hydrocarbons is between 3.0 : 1.0 and 2.0 : 1.0.
17. (Original) The absorbent article of Claim 7 wherein the immobilizing agent is soluble in the emollient.
18. (Original) The absorbent article of Claim 17 wherein the immobilizing agent is selected from the group consisting of C<sub>14</sub>-C<sub>24</sub> fatty alcohols, C<sub>12</sub>-C<sub>24</sub> fatty acids, and C<sub>12</sub>-C<sub>24</sub> fatty alcohol ethoxylates, waxes, and mixtures thereof.
19. (Original) The absorbent article of Claim 18 wherein the immobilizing agent is C<sub>14</sub>-C<sub>24</sub> fatty alcohol.
20. (Original) The absorbent article of Claim 19 wherein the immobilizing agent is C<sub>18</sub>-C<sub>24</sub> fatty alcohol.
21. (Original) The absorbent article of Claim 20 wherein the immobilizing agent is behenyl alcohol.
22. (Original) The absorbent article of Claim 21 wherein behenyl alcohol comprises from about 50 % to about 99.99 % of C<sub>22</sub> fatty alcohol, from 0 % to about 27 % of C<sub>20</sub> fatty alcohol, from 0 % to about 20 % of C<sub>18</sub> fatty alcohol, and from about 0.01 % to about 3 % of C<sub>24</sub> fatty alcohol.
23. (Original) The absorbent article of Claim 22 wherein behenyl alcohol comprises from about 63 % to about 84.9 % of C<sub>22</sub> fatty alcohol, from about 10 % to about 20 % of C<sub>20</sub> fatty alcohol, from about 5 % to about 15 % of C<sub>18</sub> fatty alcohol, and from about 0.1 % to about 2 % of C<sub>24</sub> fatty alcohol.
24. (Original) The absorbent article of Claim 7 wherein the immobilizing agent is insoluble in the emollient.
25. (Original) The absorbent article of Claim 24 wherein the immobilizing agent is a particulate thickener selected from the group consisting of silica, treated silica, fumed silica, polymethacrylate polymers, polymethacrylate and styrene copolymers, calcium silicate, treated calcium silicate, treated bentonite, treated hectorite, and mixtures thereof.

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26. (Original) The absorbent article of Claim 25 wherein the immobilizing agent is selected from fumed silica, treated bentonite, treated hectorite, and mixtures thereof.
27. (Original) The absorbent article of Claim 26 wherein the particulate thickener has an average diameter of less than about 100 microns.
28. (Original) The absorbent article of Claim 27 wherein the particulate thickener has an average diameter of less than about 20 microns.
29. (Original) The absorbent article of Claim 28 wherein the particulate thickener has an average diameter of less than about 10 microns.
30. (Original) An absorbent article comprising a body contacting surface and an absorbent core, wherein
  - (1) at least a portion of the body contacting surface comprises an effective amount of a skin care composition which is solid or semisolid at 40°C and which is transferable from the body contacting surface to the wearer's skin by contact, normal wearer motion and body heat at a level effective in providing a skin benefit to the wearer's skin,
  - (2) the skin care composition comprises a skin care active ingredient, and
  - (3) the skin care composition has viscosity of more than about  $10^5$  Poise under shear stress of less than about  $3 \times 10^4$  dynes/cm<sup>2</sup>, and viscosity of less than about  $10^2$  Poise under shear stress of more than about  $10^6$  dynes/cm<sup>2</sup>, at 40°C.
31. (Original) The absorbent article of Claim 30 wherein the skin care active ingredient is selected from the group consisting of skin care agents, proton donating agents, enzyme inhibitors, and mixtures thereof.
32. (Original) The absorbent article of Claim 31 wherein the skin care active ingredient is the skin care agent.
33. (Original) The absorbent article of Claim 32 wherein the skin care composition comprises from about 0.001 % to about 50 % of the skin care agent.
34. (Original) The absorbent article of Claim 33 wherein the skin care agent is selected from the group consisting of allantoin, aluminum hydroxide gel, calamine, cocoa

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butter, dimethicone, cod liver oil, glycerine, kaolin, petrolatum, lanolin, mineral oil, shark liver oil, white petrolatum, talc, topical starch, zinc acetate, zinc carbonate, zinc oxide, live yeast cell derivatives, aldioxa, aluminum acetate, microporous cellulose, cholecalciferol, colloidal oatmeal, cysteine hydrochloride, dexpanthenol, Peruvian balsam oil, protein hydrolysates, racemic methionine, sodium bicarbonate, Vitamin A, buffered mixture of cation and anion exchange resins, corn starch, tromamine, bizmuth subnitrate, boric acid, ferric chloride, polyvinyl pyrrolidone - vinyl acetate copolymers, sulfur, tannic acid, and mixtures thereof.

35. (Original) The absorbent article of Claim 30 wherein the skin care active ingredient is insoluble, wherein the insoluble skin care active ingredient is dispersed in skin care composition with a dispersing agent.
36. (Original) The absorbent article of Claim 35 wherein the dispersing agent is selected from the group consisting of diethanolamine polyoxyethylene oleyl ether phosphate, polyhydroxystearic acid, polyglyceryl - 6 polyricinoleate, neopentyl glycol diisostearate, propylene glycol dicaprates, isoelcosane and polyisobutene and quaternium 18, phenyltrimethicone and quaternium - 18 hectorite and triethyl citrate, isohexadecane and quaternium - 18 hectorite and propylene carbonate, octyldodecanol and quaternium - 18 hectorite and propylene carbonate, mineral oil and quaternium - 18 hectorite and propylene carbonate, isopropyl myristate and stearylalkonium hectorite and propylene carbonate, cyclomethicone and quaternium - 18 and SDA 40, lanolin oil and isopropyl palmitate and stearylalkonium hectorite and propylene carbonate and propyl paraben, 1 - eicosanol, and mixtures thereof.